COMMON QUESTIONS EMPLOYERS FACE IN DEALING WITH FEDERAL EQUAL EMPLOYMENT OPPORTUNITY LAWS AND COVID-19 AS EMPLOYEES RETURN TO THE WORKPLACE

Employers already must navigate the myriad of federal laws falling under the umbrella of equal employment opportunity laws, administered by the Equal Employment Opportunity Commission (EEOC). The COVID-19 pandemic has added new wrinkles to this complex tapestry, however. The EEOC continues to update its guidance to employers. The following addresses some common issues, questions and concerns employers face, based on the latest guidelines from the EEOC.

HAVE EEO LAWS, SUCH AS THE AMERICANS WITH DISABILITIES ACT (ADA) AND THE REHABILITATION ACT BEEN SUSPENDED IN LIGHT OF THE PANDEMIC?

EEO laws such as the ADA and the Rehabilitation Act continue to apply during the pandemic. However, the EEOC has made it clear that federal EEO laws do not prevent employers from following CDC guidelines, and guidelines from state and local authorities, regarding creating and maintaining safe workplaces. The EEOC has provided guidance regarding specific COVID-19 related workplace policies and practices that will not run afoul of federal EEO laws, some of the key items of which are discussed here.

AS AN EMPLOYER, MAY I ASK MY EMPLOYEES IF THEY HAD COVID-19? MAY I TAKE THEIR TEMPERATURES?

Yes, as an employer you MAY ask employees about the disease and you MAY do temperature screenings. Many employers are concerned about inquiring into employees' medical histories, as this has been prohibited (with limited exceptions) under the ADA. However, the EEOC has indicated that employers should consult the CDC list of COVID-19 associated symptoms, as well as state and local health authorities, and may inquire of employees with respect to any symptoms reputable medical authorities indicate may be associated with COVID-19.

AS AN EMPLOYER, MAY I ASK ONLY SOME OF MY EMPLOYEES IF THEY HAD COVID-19 OR IF THEY EXPERIENCED SYMPTOMS OR DO I HAVE TO SCREEN ALL EMPLOYEES?

Generally, the ADA prohibits singling out one or a few employees and treating them differently. In the case of COVID-19 screening, unless the employer has a reasonable belief based on objective evidence that one employee may have the disease, the ADA prohibits singling out that employee for screening. If the employee is exhibiting symptoms, for example, that would

constitute a reasonable belief based on objective evidence allowing the employer to make further inquiry.

MAY AN EMPLOYER ADMINISTER A COVID-19 TEST WHEN EVALUATING AN EMPLOYEE'S INITIAL OR CONTINUED PRESENCE IN THE WORKPLACE?

Yes, if the employer follows recommendations of the CDC or other public health authorities regarding whether, when, and for whom testing is appropriate. If employers administer testing consistent with current CDC or other public health authority guidelines, the EEOC has determined that the testing will meet the ADA's "business necessity" standard, allowing employers to require the medical testing. Employers must be careful not to single out just one or a few employees for testing, however, unless the employers have a reasonable belief based on objective evidence that the employees at issue may have the disease.

MAY AN EMPLOYER REQUIRE ANTIBODY TESTING BEFORE PERMITTING EMPLOYEES TO RETURN TO THE WORKPLACE OR ENTER THE WORKPLACE INITIALLY?

No. Under the ADA, an antibody test constitutes a medical examination, which generally is prohibited unless it meets the ADA's "job related and consistent with business necessity" standard for medical examinations. Currently, based on CDC's guidelines, the EEOC has determined antibody tests do not meet the business necessity standard. The EEOC has indicated it continues to monitor CDC guidelines and could update this in response to any changes in CDC recommendations regarding antibody testing.

WHAT MAY AN EMPLOYER DO UNDER THE ADA IF AN EMPLOYEE REFUSES TO ALLOW HIS/HER TEMPERATURE TO BE TAKEN OR REFUSES TO ANSWER COVID-19 SCREENING QUESTIONS?

The employer may prohibit the employee from coming into the workplace. The EEOC recommends that the employer discuss the refusal with the employee to try to ascertain what the employee's concerns are and gain the employee's cooperation. However, if the employee simply refuses, the employer may bar the employee from the workplace.

WHERE DOES THE EMPLOYER NEED TO FILE ANY SCREENING, TEMPERATURE, OR OTHER COVID-19 RELATED EMPLOYEE INFORMATION?

Employee information, temperature screenings, testing results, and other COVID-19 related information is confidential medical information that must be treated like all other confidential employee medical information. Special "COVID related" files do not need to be created for this information. Any COVID related employee information must be stored in the employee's medical records file and must be kept confidential. It is not to be stored in general personnel files.

Creating and maintaining a safe workplace is the goal of employers. In meeting this goal, employers must be careful that they do not run afoul of EEO laws. Garcia & Milas' employment attorneys are available to answer questions that may arise as employers navigate the unique challenges creating by COVID-19.

This publication is for general information purposes only and is not and is not intended to constitute legal advice. The reader should consult with legal counsel to determine how laws or decisions discussed herein apply to the reader's specific circumstances

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